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In The

SUPREME COURT OF THE UNITED STATES

No. 76-1745

ROBERT BAGERIS, et al,

Petitioners,

v

LOUIS D. McGREGOR, et al,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS LOUIS D. McGREGOR, TIMOTHY C. QUINN AND JOHN GILLIS IN OPPOSITION

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OPINIONS BELOW

The unreported Opinion and Corrected Opinion of the Michigan Court of Appeals are reprinted at pages 26-28 of the Petition for a Writ of Certiorari. The unreported Opinion and Order of the United States District Court for the Eastern District of Michigan dismissing Plaintiff's civil rights action is reprinted at pages 20-25 of the Petition. The unreported Order of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the District Court is reprinted at pages 18-19 of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for Writ of Certiorari.

QUESTION PRESENTED

Does a complaint which merely indicates dissatisfaction with an order from an intermediate State appellate court reversing a portion of a contract damages award and remanding the case for additional proofs on the element of damages, if any, state a claim upon which relief can be granted under the Civil Rights Act, 42 USC § 1983?

STATUTES AND COURT RULES INVOLVED

In addition to the constitutional provisions, statutes and court rules quoted on pages 14-18 of the Petition, this case involves the following statute and court rule:

MCLA 600.310; MSA 27A.310:

> "The Court of Appeals has original jurisdiction to issue prerogative and remedial writs or orders as provided by rules of the Supreme Court, and has authority to issue any writs, directives and mandates that it judges necessary and expedient to effectuate its determination of cases brought before it."

Michigan General Court Rules 1963, 810(1):

> "Review of issue tried without a jury. (1) Upon appeal to the Court of Appeals from a judgment involving an issue tried without a jury, such judgment may be affirmed or reversed, the cause remanded with directions, or a new trial ordered."

STATEMENT OF THE CASE

On December 17, 1970, the Petitioners entered into a partnership agreement with Gabriel Glantz and Steven J. Glantz, and on December 23, 1971, an amendment to this agreement was executed. (Copies of these documents are reproduced at pages 28-32 of the Petition.) The term of the contract was for a period of three years, until December 16, 1973. On January 19, 1972, Steven and Gabriel Glantz filed suit in the Circuit Court of Wayne County, Michigan, against Petitioners alleging breach of the partnership agreement. On August 30, 1973, a trial judge found that Bageris had breached the contract and the Glantzes were awarded actual damages of $47,011.87 and future damages of $75,000. The Petitioners appealed to the Michigan Court of Appeals alleging, *inter alia,* that future damages could not be awarded since they were too speculative and uncertain. No cross appeal was taken by the Glantzes.

On February 26, 1975, a panel of the Michigan Court of Appeals composed of the Respondents, Louis D. McGregor, Timothy C. Quinn and John H. Gillis upheld the findings of fact and conclusions of law of the trial judge as to the liability of the instant Plaintiffs for breach of the contracts. The computation of actual damages was affirmed, but because the trial court's computation of the amount of future damages had been made before the contracts had expired, the Court of Appeals found that computation to be "speculative and not supported by the record" and the award of $75,000 was reversed. By the time the Michigan Court of Appeals had decided the case however, the contracts had expired by their own terms and since speculation was thus no longer required in order to accurately compute damages, the case

was remanded to the trial court for proof of damages, if any, sustained by the Glantzes, between the date of the trial court judgment and the date of expiration of the contracts breached by Petitioners. A copy of the unreported Michigan Court of Appeals opinion is reproduced at pages 26-28 of the Petition. Subsequent applications by Petitioners for rehearing in the Michigan Court of Appeals and for leave to appeal to the Michigan Supreme Court were denied.

Dissatisfied with the Michigan Court of Appeals remand order, Petitioners instituted this suit for declaratory judgment and injunctive relief under the Civil Rights Act, 42 USC § 1983. Petitioners requested the convening of a three-judge court pursuant to 28 USC § 2283, for injunctive relief against enforcement of the Michigan Court of Appeals remand order and for a declaratory judgment that the Michigan statutes and court rules authorizing such remands are unconstitutional as applied to Plaintiffs. Defendants filed a motion to dismiss for failure to state a claim upon which relief could be granted and the case was subsequently dismissed in light of the District Court's decision that no substantial federal question was presented. On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's judgment of dismissal. Copies of these opinions and orders are reproduced at pages 18-25 of the Petition.

ARGUMENT

THE DECISION OF THE COURTS BELOW WAS CLEARLY CORRECT AND THIS CASE PRESENTS NO IMPORTANT QUESTIONS OF FEDERAL LAW WHICH MUST BE SETTLED BY THIS COURT.

I.

THE DISMISSAL OF PETITIONERS' CIVIL RIGHTS ACTION WAS CORRECT BECAUSE THE COMPLAINT RAISED NO SUBSTANTIAL FEDERAL QUESTIONS.

Federal jurisdiction in civil rights actions must be predicated upon the presentation of substantial federal questions, the existence of which must be demonstrated by the complaint. *Ex parte Poresky*, 290 US 30, 31-32 (1933). In the instant case no substantial federal question exists because the claim asserted by Petitioners is obviously without merit and its unsoundness is clearly demonstrated by previous decisions of this Court on the subject. *Ex parte Poresky, supra; Bailey* v *Patterson*, 369 US 31 (1962).

Petitioners' assertion that this case presents substantial questions of constitutionality is clearly without merit. Their mistaken belief results from a misapprehension of the effect of the Michigan Court of Appeals opinion. The issue raised on appeal in the Michigan state courts dealt with Petitioners' liability for damages due to its breach of the contract. The Court of Appeals opinion on this issue affirmed the trial court's judgment against Petitioners. The only aspect of the appeal in which they can be said to have been successful was the determination that the acts disclosed by the record did not support an award for future damages in the amount of $75,000. The Court of Appeals opinion affirmed Petition-

ers' liability for damages and remanded the case to the trial court merely for further proofs, if any, on the issue of damages. The remand order did not determine any rights of the parties (i.e., it was not "an issue" of the case); it merely determined the forum for subsequent proceedings, if any, after the substantive issue (affirmance of liability) had been decided.

In addition to the patent lack of merit in the Petitioners' claim, the decision below is not in conflict with decisions of this Court and, in fact, previous decisions of this Court and the Michigan Supreme Court have foreclosed the question of whether an appellate court may remand a case to a trial court for computation of damages. As long ago as 1915 this Court held that in a proper case a state appellate court could constitutionally grant a partial new trial limited to the amount of damages only. *Norfolk Southern Railroad Co* v *Ferebee*, 238 US 269 (1915); *Gasoline Products Co* v *Champlin Refining Co*, 283 US 494 (1931). See also Annotation: "New Trial on Questions of Damages Only," 75 L Ed 1191, 1192 (1931) where numerous cases from many jurisdictions are cited in support of the statement that the rule is "well-established that in a proper case, an appellate court had power at common law, or when expressly authorized by statute, upon reversing a case, to award a new trial upon the question of damages only." In *Devine* v *Patteson*, 242 F2d 828 (CA 6, 1957) *cert den* 355 US 821 (1957) a malicious prosecution action in which the plaintiff appealed on the basis of insufficiency of the evidence, the Court held that the issue of liability was distinct from the issue of damages so that a new trial solely on the question of damages was ordered.

Similarly, Michigan appellate courts have long recognized the principle that an appellate court has the power to remand a case back to a trial court for a determination solely on the issue of damages. In *Rich* v *Daily Creamery Co*, 296

Mich 270 (1941), an action for breach of contract, a jury verdict in favor of plaintiffs was reached and damages were assessed. On a motion for new trial, the Court evidently concluded that the instructions to the jury had not charged definitely enough on the question of damages, leaving too much to the jury's speculation and the trial court ordered a remittitur or new trial. Defendants appealed claiming that the Court's remittitur arrived at a verdict by pure speculation. The Michigan Supreme Court agreed and granted a new trial "for the assessment of damages only, under the rules of law applicable to the measurement of damages sustained by plaintiff for the wrongs complained of and established by him in this action." 296 Mich at 288. After further proceedings in the trial court the case was again appealed to the Michigan Supreme Court which affirmed, *inter alia*, the earlier order remanding solely on the issue of damages. *Rich* v *Daily Creamery Co*, 303 Mich 344 (1942). *Rich* has been cited with approval in subsequent decisions by the Michigan Supreme Court. See, e.g., *Sullivan* v *Ulrich*, 326 Mich 218 (1949). Additionally, the remand procedure utilized in the instant case by the Michigan Court of Appeals is sanctioned not only by case law but also by statute, MCLA 600.310; MSA 27A.310, and court rule, GCR 1963, 810(1).

The overwhelming majority of jurisdictions support the proposition that in a proper case an appellate court may grant a remand or new trial solely on the issue of damages, totally apart from questions of liability. See, e.g., Annotation: "Propriety of Limiting to Issue of Damages Alone New Trial Granted on the Ground of Inadequacy of Damages Awarded," 29 ALR2d 1199 (1953). It is apparent that Plaintiffs' assertions as to the propriety of the Michigan Court of Appeals remand order are clearly without merit and the unsoundness of their position is so clearly demonstrated from previous decisions as to foreclose the subject. Thus, no substantial question of constitutionality is presented and

there is no need for a three-judge court. *Ex parte Poresky, supra.*

II.

THE REMAND ORDER OF THE MICHIGAN COURT OF APPEALS DID NOT DEPRIVE PETITIONERS OF DUE PROCESS OF LAW.

Petitioners argue that their right to due process of law was somehow violated because they claim they were not afforded prior notice and opportunity to be heard before the Michigan Court of Appeals entered its order remanding the case to the trial court for further proofs on the issue of damages. They assert injury because notice and hearing could have produced a different result (i.e., the remand order would never have been issued) and state that damages are "inevitable" upon the remand. The lack of merit in these allegations is readily apparent from the fact that the form and substance of the remand order was in compliance with well-established Michigan law and that damages are "inevitable" on remand only if Petitioners fail to present adequate proofs at any subsequent evidentiary proceeding.

By statute, the Michigan Court of Appeals has authority "to issue any writs, directives and mandates that it judges necessary and expedient to effectuate its determination of cases brought before it." MCLA 600.310; MSA 27A.310. Furthermore the Michigan General Court Rules specifically provide that when reviewing a judgment involving an issue tried without a jury, "such judgment may be affirmed or reversed, the cause remanded with directions, or a new trial ordered." GCR 1963, 810(1). The existence of the statutes and court rules and the line of cases which includes *Rich* v *Daily Creamery Co,* 296 Mich 270 (1941) must be deemed sufficient to place Petitioner on notice of the possibility of a remand order such as the one which was entered

by the Michigan Court of Appeals. Petitioners thus had the opportunity to present argument on the propriety of a remand order, but did not do so. Petitioners' position, if followed to its logical extreme, would require a holding that if error is found in a trial, a state appellate court is constitutionally powerless to order any corrective procedures in the trial court unless the merits of each of those procedures have been specifically argued on that appeal. Under Petitioners' point of view the only appellate remedy available would be an absolute reversal of an erroneous trial court judgment. The constitutionality of every appellate proceeding could apparently only be saved if all parties fully brief and argue the merits of each and every remedy historically available to an appellate court for the disposition of cases brought before it. The absurdity of this position is self-evident.

Petitioner admits on page 9 of the Petition that the remand order "in and of itself does not deprive Petitioners of property." In fact, the decision of the Michigan Court of Appeals has resulted in a windfall of $75,000 to the Petitioners. Thus there has been no demonstrable injury or deprivation of property as a result of the remand order. Petitioners' obvious fear, of course, is that after all the proofs have been presented in a subsequent state court proceeding, they will be found liable for a substantial amount of damages. Such fears, however well founded, do not constitute a deprivation of due process of law.

Even if it were held that Petitioners' due process rights were somehow violated by the Michigan appellate procedures, it does not necessarily follow that the proper remedy was prior notice and hearing before issuance of the remand order. As this Court said in *Goldberg* v *Kelley,* 397 US 254, 263 (1970):

> ". . . Consideration of what procedures due process may require under any given set of circumstances must

begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

In the instant case the governmental interest involved is the efficient functioning of the state court system. Whatever interest Petitioners may have in obtaining prior notice and hearing before a Michigan appellate court can issue a procedural remand order is clearly out-weighed by the government interest in maintaining the orderly and time-honored procedures of its appellate courts. Because Petitioners have not been injured, because they had notice of the possibility of the issuance of the remand order, and because opportunity for a hearing will be presented to them at any future state court proceedings, the decision of the courts below that they had not been denied due process of law is correct.

III.

THE COURTS BELOW CORRECTLY CONCLUDED THAT THE RESPONDENTS ARE PROTECTED BY THE DOCTRINE OF JUDICIAL IMMUNITY.

In *Pierson* v *Ray*, 386 US 547 (1967) this Court held that judges were immune from liability for damages in civil rights actions. Additionally it has been held that his immunity also extends to declaratory and injunctive actions brought under the Civil Rights Act. *Littleton* v *Fisher*, 530 F2d 691 (CA 6, 1976). Because the actions complained of were undertaken by Respondents in the performance of their judicial activities, the Courts below correctly concluded that this suit against judges and court officials acting under color of judicial authority is barred by the doctrine of judicial immunity.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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